



The Phoenix House *circa 1820*

The Borough of Mendham
2 West Main Street, Mendham, New Jersey 07945
Incorporated May 15, 1906

Telephone: 973-543-7152
Fax: 973-543-7202

To: The Federal Communications Commission
 Washington, DC 20554

Re: WT Docket No. 13-238
 WC Docket No. 11-59
 WT Docket No. 13-32
 NPRM: FCC 13-122

COMMENTS OF THE PLANNING BOARD OF THE BOROUGH OF MENDHAM, MORRIS COUNTY, NEW JERSEY, TO THE FCC'S NOTICE OF PROPOSED RULE MAKING REGARDING WIRELESS FACILITIES SITING POLICIES

I. Introduction

Mendham Borough encompasses approximately six (6) square miles in the south central part of Morris County and is primarily known for its small town village character. What is now Mendham Borough was settled in the 1740s by the Byram family, who gave the settlement several of the landmarks which still provide the community with its historic character, including the Black Horse Inn (an 18th and 19th century stage coach stop) and the original Hilltop Church.

The Borough has developed away from its agricultural roots over the second half of the 20th century, becoming a local mercantile center and a premier residential community. As the community has become more tied to the character and quality of its residential identity, the historic character of the Borough has become a key component of this identity. This historic character now defines Mendham and is intimately tied to the Borough's status and prosperity as well as to the identity of Mendham for its residents. Protective of its character, its streetscape, its development, and its residents, Mendham is a community where the names of its founding families have become the names of many of its streets, where homes sold are often referred to by the last name of the seller rather than by the street address, and where children often return to raise the next generation.

Mendham created a Historic District decades ago, focused principally on the village business district. The Historic District has, in more recent years, been expanded to include more properties. The Borough sought and obtained registration of its entire Historic District on both the New Jersey and National Registers of Historic Places. A Historic Preservation Commission was formed by ordinance to enhance and preserve this historic character.

Home to a slow growth population of approximately 5,000 residents, Mendham Borough is a largely residential community of homes on land parcels ranging from ¼-acre lots to over 25 acres. With few existing lots available for development, Mendham Borough can best be described as a nearly built-out community. In fact, while there has been some new construction during the past decade in areas toward the Borough's outer borders, the heart of Mendham Borough, its Village Center, experiences much more renovation, restoration, and preservation than it does new construction. An active Planning Board, Board of Adjustment, Historical Preservation Commission, and Borough Council will continue to assure proactively that new development does not come at the expense of the historic character of the Borough, and that the vision of the Borough's leaders over the years continues to be maintained.

Historic but progressive, Mendham Borough adapts to the times while ensuring that the values upon which the community is based remain intact. The Borough is committed to finding ways to work to protect the community and the environment, while accommodating the trend towards larger homes, the growth of home offices and home professions, and more. The quality of life of its residents is a top priority of Mendham Borough.

The Mendham Borough Planning Board is charged with the responsibility for long term planning for the Borough as to its land use, historical preservation, infrastructure and resources. It fulfills this responsibility by establishment, and periodic re-examination, of a comprehensive Master Plan -- a goal oriented document on which zoning and other municipal decisions and actions should be based. The Planning Board also acts as the hearing and approving authority for site plan and subdivision applications and related variance relief.

The comments herein are offered from the perspective of a small municipality which has taken great pains to encourage and support environmental responsibility and historic preservation, including achieving New Jersey and National Historic Register status for a major portion of its Main Street corridor and village center.

II. Subject: Expedited FCC environmental review, which includes effects on historic properties, with regard to development of small cells, Distributed Antenna Systems (DAS), and other small-cell wireless technologies that may have minimal effects on the environment.

- A. The reduced likelihood of significant environmental impacts on the lands and waters of the affected area does not conclude the inquiry.
- B. Notwithstanding smaller size of individual elements, the broad spread of a great number of such elements can still result in serious negative impacts on the visual environment and this is especially true in an historic district or in the vicinity of historic properties.
- C. Therefore, need to retain the right of the municipal Boards charged with land use law administration to examine and evaluate proposals, the impacts they may have, available mitigation measures, and ultimate acceptability
 - 1. Board involvement, NOT simply administrative review
 - 2. Adequate time for informed review and discussion
 - 3. Applicability of local and state land use laws, including processes for appeals, to reflect the acts, concerns and criteria appropriate to the particular place

Subject: Clarification of requirements under Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) regarding approval as a matter of right of modifications of eligible facilities (wireless towers or base stations), including collocation requests, as well as removal requests for removal or replacement of equipment, that does not substantially change the physical dimensions of such tower or base station.

D. Definition issues

1. “eligible facilities” should be limited to the common meaning of “tower” and “base station” -- a previously approved facility, NOT “any structure” which does or could support antennas or contain non-antenna transmission equipment
2. “collocation” should be limited to its common meaning - i.e., the addition of antennas to a tower already supporting antennas or of non-antenna transmission equipment to an area already containing a base station
3. “removal”, if that is all it means, is self-explanatory. And, if limited to its clear meaning, usually does not require land use approvals. It is not a siting issue, but rather an issue often treated in a siting approval as a requirement for decommissioning when the antennas and/or facility will no longer be used.
4. “removal” becomes an issue when it is paired with “replacement”. This should be limited to same or similar equipment of similar dimensions and appearance, continuing to satisfy any conditions of approval.

E. If the “modifications” are to be permitted as a matter of right, this should apply only to:

1. As to collocation:
 - (a) Collocating on an existing approved tower or in an existing approved base station enclosure/area;
 - (b) Antennas or equipment conforming to any conditions of the applicable approval(s);
 - (c) Conforming to all applicable laws, regulations and codes, including construction and safety codes; and
 - (d) Without substantial change in physical dimensions of tower or base station from those originally approved.
2. As to replacement:
 - (a) Upgrading or exchange of existing antennas or non-antenna transmission equipment;
 - (b) With antennas or non-antenna transmission equipment of the same or similar type;

- (c) Of similar dimensions to the originally-approved antennas or non-antenna transmission equipment;
- (d) Conforming to any conditions of the applicable approval(s); and
- (e) Conforming to all applicable laws, regulations and codes, including construction and safety codes.

Subject: NEPA Environmental Review Exclusion & Sec. 106 Historic Preservation Review (NHPA) Exclusion/Exemption

- F. Should not expand the exemption/exclusion. It presently applies to collocation on an existing building or tower, and this should be the limit of its scope.
- G. Provided “collocation” does not apply to anything other than additional antennas, on an existing building or tower which already supports fully approved antennas, there are still issues:
 - 1. The need for effects on historic properties to remain in the evaluation -- NOT be excluded;
 - 3. Limiting to DAS and small-cell deployments; and
 - 3. Limiting to the first such collocation, since the cumulative effects of a series of collocations could raise more serious impact issues.
- H. This methodology allows at least indirect reliance on a previous siting decision and its protective or mitigating conditions.
- I. As “other structures” and, more particularly, the “collocation” concept is permitted to expand, reliance on the fact that at least the basic site location and its development and use as a wireless communication facility were approved after a full hearing of the benefits and detriments to the proposal; this culminates, at its worst, if “collocation” is permitted to include first equipment and/or initial siting (stretching the purported limited concept to complete avoidance of review of an entire facility).
- J. Provided the limiting factors outlined above (Section II D & E) are observed, it would appear effective to define applicability of the exclusion not by specific technology, but by dimensions and other objective characteristics. The mischief which might otherwise result from this choice is minimized by the application of the limiting definitions and criteria.
- K. On the question of streamlining historic preservation review (instead of an across-the-board exclusion), such as by permitting a single review addressing a DAS or small-cell deployment, rather than separate reviews for each node, this would seem an efficient process which could still achieve its desired purpose, provided individual nodes found to produce unacceptable impacts could be called out for deletion or modification to address the problem, while passing affirmatively on the balance of the deployment.
- L. Finally, it is submitted that reliance on Sec’s. 1.1307(c) and (d) of the Commission’s rules to provide a fail-safe in an exclusion environment is of little solace to the local land use Board, which in real life is not likely to be aware of the threat until long after the fate of its source has been decided by the Commission.

III. Subject: Environmental Notification Exemption for Registration of Temporary Towers

- A. While not seeing numerous issues from a local land use Board point of view, there are a couple of things deserving mention in regards to the Temporary Towers exemption from the environmental notification process.
1. In connection with the deployment of a temporary tower, the carrier involved should give notice to the municipality and county where the temporary tower is to be located, providing the responsible party's identity and contact information for the appropriate person(s) for communications.
 2. There should be defined consequences for exceeding the applicable time limit for deployment of the temporary tower, as well as for any failure to adhere to the conditions of the deployment. Similarly, there should be a defined process for seeking relief when necessary from any of the conditions of deployment and/or for extension of the time limit, which process should provide for notice to the municipality and county where the temporary tower is located.

IV. Subject: Implementation/Streamlining of Sec. 6409(a) review process for collocations and other minor facility modifications

- A. Initially, it is suggested that the development procedures for this process should be given time and be permitted to seek a workable level which actually balances the local zoning and planning interests with the legitimate needs of the carriers to avoid overly-burdensome regulation.
- B. In the first instance, the key would seem to be definitional. As described above in Section II D & E: (1) "collocation" should be limited to its common meaning -- in general, the addition of equipment at a previously approved tower or base station. This assures that a threshold decision has been made that the site is appropriate for wireless communications equipment after a full evaluation in a land use hearing. This would not be the case if "collocation" were deemed to include the first deployment of equipment at a site, if the nature of the equipment involved was entirely different from the type(s) previously approved, or if the proposed "collocation" involved equipment of dissimilar dimensions; and (2) "minor facility modifications" should be just that -- modifications not appearing to create meaningful issues different from those addressed with the original approval.
- C. It is important that the process and the time available for its completion be adequate to permit the land use Board which gave the original approval to make an informed determination of whether the criteria described above are satisfied -- and this resulting in eligibility for Sec. 6409(a) treatment. If the suggested criteria are adopted, sufficient to allow the municipal land use interests to be meaningfully weighed in the balance, this determination should not be treated as a ministerial or administrative task.
- D. Under the Municipal Land Use Law in New Jersey [N.J.S.A. 40:55D-1, et seq.] applications are deemed "complete" when the appropriate checklist of required information has been satisfied. There are time frames for the municipal officer to make this determination and default "completeness" if the submission is not properly and timely handled. Similarly, there are then time frames for a decision by the Board and, except for applicant-agreed extensions of time, provision for default "approval" if the Board has failed to reasonably attend to the matter.
- E. Again, care must be taken in definitions. To the extent that wireless towers and/or base stations are to be given exemptions from, or streamlining of, a review process for collocations or minor modifications, such treatment cannot be extended beyond the approved tower(s) or base station(s), built for the sole or primary purpose of supporting antennas or non-antenna transmission equipment.

To allow such expansion will court endless problems at the local zoning and planning level, including uncontrolled expansion of non-conforming uses and/or structures contrary to established legal principals and location of wireless equipment where the site has never been approved for such structures or uses. This would not strike a balance between local planning and industry interests. It would bypass the zoning and planning process -- even where that has been found to work efficiently and effectively.

F. Finally, as to process and procedure, suggested considerations are as follows:

1. The mandate should be to balance local zoning and planning interests with the needs of the wireless communications industry to have viable avenues for deployment of additional equipment and new technologies and NOT to preempt the field on issues of siting and evaluation of local negative impacts;
2. Recognize that existing local, county and state processes are sufficiently varied that an effort to impose a single, universal, federal procedure will result in great disruption, disrespect for local interests and a groundless disregard for the principles of federalism. The states, their local subdivisions, and -- where necessary -- their courts, should have the opportunity to fashion processes and procedures which recognize local zoning and planning interests within a contextual understanding of the national interest in a highly functional wireless communications network.
3. These purposes are best served if the exemption and/or streamlining treatments are limited in their application as described above -- particularly (a) existing approved towers or base stations (as those terms are commonly understood); (b) consistent with original approvals and conditions of approval, compliant with all laws, regulations, and codes; (c) subjected to review by the original approving authority by way of an application process requiring submissions of sufficient information and data to establish (i) eligible facility, (ii) covered request, (iii) consistency with initial approvals and conditions, and (iv) compliance with laws, regulations and codes.
4. Time periods for determination of "completeness" of the application and for decision by the particular Board should be governed by each state's Land Use Law (where, as under New Jersey law, such is provided), or set by federal regulation in a manner which recognizes not only the carrier's desire to move forward [on something, it should be noted, that it has probably been planning and working on for many months, if not years], but also the needs of the approving authority to have adequate information, time for review (sometimes including a need for outside technical consultation), and the practical ability to work to a reasonable result -- all with the recognition that in many states, including New Jersey, the members of such Boards are citizen volunteers and meetings are often only once or twice per month.
5. A federally-mandated "deemed granted" result should not be imposed where its purpose can be adequately served by a state law or local provision for such default results. If it is to be fashioned on a federal level for jurisdictions without such process, it should be designed to address only clear cases of state or local foot-dragging. This requires a sufficient recognition of the need for the submission of adequate information, and time for review and informed decision-making by the approving authority.
6. Resolution of any challenge to Board action, or claims of inaction should be left to the normal channels of land use decision reviews by state courts -- or, if directed to federal courts, to being reviewed under the same principles which would be applied in a state court review of a land use decision.

The Planning Board of the Borough of Mendham urges the Commission to proceed in a fashion which does not nullify local interests by way of overly broad definitions or overly inclusive federal mandates.

Dated: _____

For the Mendham Borough Planning Board

A handwritten signature in black ink, appearing to read "RG Kraft", written over a horizontal line.

Richard G. Kraft, Chairman